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#03-44 (WPCB) Antidegradation Standards and Implementation Procedures

Ms. Megan Wallace

Office of Water Quality, Rules Section

Indiana Department of Environmental Management

P.O. Box 6015

Indianapolis, Indiana 46206-6015

RE: Indiana Water Quality Coalition and Indiana Manufacturers Association
Comments on First Notice of Rules Concerning Antidegradation
Standards and Implementation Procedures

Dear Ms. Wallace:

The Indiana Department of Environmental Management published a first notice of comment period on development of new rules and amendments to rules concerning antidegradation standards and implementation procedures in the March 1, 2003 Indiana Register. The Indiana Water Quality Coalition and the Indiana Manufacturers Association offer the following comments on the first notice.

The Indiana Water Quality Coalition is a group of businesses with shared interests in Indiana regulations, policies and operating procedures concerning water quality. The members of the Indiana Water Quality Coalition include: Indiana Coal Council, Indiana Builders Association, Indiana Manufacturers Association, Hoosier Energy, NiSource Inc., Jefferson Smurfit Corporation, BP, American Electric Power, Eli Lilly and Company, and G.E. Plastics. The Indiana Manufacturers Association is a voluntary, non-profit trade association representing nearly 2,000 companies and 600,000 manufacturing jobs. Indiana Manufacturers Association staff provide support to and management of the Indiana Water Quality Coalition, including periodic spokesperson duties. Members of the Indiana Water Quality Coalition and the Indiana Manufacturers Association have facilities with NPDES permits, and will be directly affected by revisions to Indiana's antidegradation standards and implementation procedures.

It is important, when discussing antidegradation issues, to remember one critical fact: we are talking about waters that possess water quality better than applicable standards. It is an absolute requirement that waters must attain standards. Waters that do not attain standards must be placed on the State's §303(d) list, and IDEM will have to develop a total maximum daily load and impose control requirements based on the allocations derived from the TMDL. Those requirements will bring waters back into compliance with standards. In the antidegradation context, we are dealing with waters that already attain standards. For these waters, antidegradation imposes additional requirements because the water constitutes an important resource that, for policy reasons, is deemed worthy of special protection. It is important to recognize that this is a policy judgment, not an environmental protection judgment, because water quality is already protected sufficiently by standards. In making that policy judgment, IDEM and the Board must take a broad range of factors into account, including the social and economic impacts from imposition of onerous antidegradation requirements. Antidegradation standards and implementation procedures can result in more stringent permit limits, significant changes in facility operations, and restrictions or even prohibitions on new and increased discharges. Such effects in turn lead to additional compliance costs, increases in taxes for Indiana residents and businesses, and adverse impacts on economic growth and employment in the State. Therefore, we urge IDEM and the Board to seriously consider, for each proposed change to the current rules, whether the change is truly necessary and whether its benefits justify the resulting social and economic impacts.

THE SEA 431 MANDATE

Senate Enrolled Act 431, P.L. 140-2000 ("SEA 431"), enacted several requirements concerning the antidegradation policies and implementation procedures and designation criteria and processes for outstanding national resource waters ("ONRWs"), outstanding state resource waters ("OSRWs"), and exceptional use waters. Especially as it concerns OSRWs and exceptional use waters, the statute establishes antidegradation standards and implementation procedures that are less restrictive than the current Indiana rules. These revisions will provide greater flexibility for dischargers to these waters, with the benefit of allowing social and economic benefits to these areas. However, since 2000, when SEA 431 was enacted and became effective, little progress has been made to revise Indiana's rules to implement the provisions of SEA 431. We support the effort to initiate this process, and encourage IDEM and the Board to vigorously pursue this rulemaking.

It is critical to carefully consider not only the substantive requirements of SEA 431, which are discussed in detail in these comments, but also the timing and sequence for rulemaking and implementation. Two sections of that legislation required rulemaking actions by completed by specific dates. Section 25 provided that the Board shall amend the rules setting forth the antidegradation standards to be consistent with SEA 431 by January 1, 2001. IDEM published a first notice to initiate this rulemaking after this statutory deadline. *See* 24 Ind. Reg. 2471 (May 1, 2001). That first notice was not followed by additional action, and it would appear that the present first notice is replacing that May 2001 proposal.

Section 27 required the Board to consider whether waters in the exceptional use category should be redesignated as OSRWs by October 1, 2002. This rulemaking process also did not occur within the time specified in the statute, and can not be completed until the Board adopts antidegradation implementation procedures for OSRWs. *See* SEA 431, section 17, codified at IC 13-18-3-2(n) (“For a water body designated as an outstanding state resource water after June 30, 2000, the board shall provide by rule antidegradation implementation procedures before the water body is designated in accordance with this section.”).

Sections 25 and 27 were both non-code provisions, and have expired without being executed. As a result, the General Assembly has passed a bill this year to reauthorize these sections to ensure that IDEM and the Board are still required to undertake the required actions. *See* House Enrolled Act 1221 (2003), pending action by the Governor. These deadlines must be taken seriously in the future.

**INSIGNIFICANT LOWERINGS OF WATER QUALITY TO WHICH THE
ANTIDEGRADATION IMPLEMENTATION PROCEDURES SHOULD NOT
APPLY**

SEA 431 provides a definition for “degradation” of OSRWs that is only triggered when there is a significant lowering of water quality. *See* SEA 431, Section 17, codified at IC 13-18-3-2(b)(2). The statute’s provisions concerning antidegradation implementation procedures for OSRWs provide the following definition of “significant lowering”:

- (m)...(1) A definition of significant lowering of water quality that includes a de minimis quantity of additional pollutant load:
 - (A) for which a new or increased permit is required; and
 - (B) below which antidegradation implementation procedures do not apply.

SEA 431, Section 17, codified at IC 13-18-3-2(m)(1).¹ This language unambiguously requires a de minimis level for outstanding state resource waters. This de minimis level is triggered when a discharger needs a new or increased permit limit. If the new or increased discharge is below the de minimis level, the antidegradation implementation procedures do not apply to the discharge. Although the provisions of SEA 431 do not expressly apply to high quality waters that are not designated as OSRWs, it only makes sense to extend the de minimis concept in SEA 431 to all high quality waters (except ONRWs). Otherwise, the antidegradation implementation procedures for regular high quality waters would be more stringent than the requirements for OSRWs.

¹ This definition also applied to degradation in exceptional use waters until the time that they are considered for redesignation by the Board.

SEA 431's allowance for de minimis lowerings is consistent with federal policy. EPA has consistently interpreted its antidegradation policy as requiring review only if there will be a significant lowering of water quality. It has also consistently allowed States the discretion to define what constitutes significant lowering or degradation.

- EPA Region V Guidance for Antidegradation Policy Implementation for High Quality Waters (Dec. 3, 1986): “[T]he Region will consider that antidegradation requirements have been satisfied where it is demonstrated that there will be no significant lowering of water quality. The definition of a “significant” change will be left up to individual States, subject to Regional approval.”
- Water Quality Guidance for the Great Lakes System: Supplementary Information Document, EPA-820-B-95-001 (Mar. 1995), p. 208: “States and Tribes may include de minimis provisions in their antidegradation policy De minimis provisions provide a means for States and Tribes to differentiate between actions that will likely result in an increased loading of a pollutant to a receiving water that is likely to have a significant impact on water quality and those that are unlikely to do so and focus review efforts on actions that will degrade water quality. It is reasonable to assume the loading increases of non-BCCs that will use less than ten percent of the remaining assimilative capacity in a water body will have a negligible effect on ambient water quality.”
- Advanced Notice of Proposed Rulemaking on the Water Quality Standards Regulation, 63 Fed. Reg. 36741, 36783 (Jul. 7, 1998): “Applying antidegradation requirements only to activities that will result in significant degradation is a useful approach that allows States and Tribes to focus limited resources where they may result in the greatest environmental protection.”
- Water Quality Standards for Kentucky, 67 Fed. Reg. 68971, 68978 (Nov. 14, 2002): “EPA has long interpreted the antidegradation policy to allow a determination that certain proposed new discharges or increases in existing discharges may have an insignificant or *de minimis* impact on water quality and, therefore, may not require an antidegradation review.

Trigger: New or Increased Permit Limit

SEA 431 provides that de minimis allowance applies only when a lowering will trigger the need for a new or increased permit limit. See SEA 431, section 17, codified at IC 13-18-3-2(m)(1) (“a de minimis quantity of additional pollutant load ... for which a new or increased permit limit is required...””) (emphasis added). The rulemaking should clearly establish that antidegradation review is only triggered when a discharge needs a new or increased permit limit. This trigger concept already is articulated in 327 IAC 5-2-11.7, the antidegradation implementation procedures for OSRWs in the Great Lakes system. See 327 IAC 5-2-11.7(a)(1) and (2). This language should be incorporated in the implementation procedures for high quality waters and OSRWs throughout the State.

The “new or increased discharge” trigger only should apply to incremental or “net” increases. For example, when new units are installed at an existing facility, only the discharges associated with the incremental increase in flow from those new units should undergo antidegradation review. Similarly, when old units are replaced with new ones, only the “net” increase, if any, in the discharge from the units should be evaluated. Conversely, if a rehabilitation project does not result in a “net” change in the discharge, it should not trigger antidegradation review. Needless to say, in situations where there is a “net” increase that is subject to review, only the “net” amount should be subject to antidegradation restrictions. The “net” approach also should apply to entirely new or expanded projects where the project proponent succeeds in procuring, from other point or nonpoint sources within the watershed, reduced loadings of the pollutants to be discharged from the new project. The opportunity to “trade” will facilitate economic growth (and energy availability), while at the same time protecting water quality. This approach is consistent with EPA’s new water quality trading policy. Also, intake pollutants should be “netted” out of antidegradation review.

Numeric De Minimis Allowance

The rules should contain de minimis of ten percent of unused loading capacity (as long as at least 10 percent of total loading capacity remains unused) for high quality waters and OSRWs. This de minimis level is consistent with the current antidegradation implementation procedures for high quality waters in the Great Lakes system. *See* 327 IAC 5-2-11.3(b)(1)(B)(ii). Many other States also provide a similar de minimis. Examples include:

- Michigan: “Increased loadings of a pollutant which do not involve a BCC and which use less than 10% of the unused loading capacity that exists at the time of the request.” Michigan Rule 323.1098(9)(c).
- Wisconsin: “expected levels in the receiving water of the indicator parameters as a result of the proposed new or increased discharge” do not exceed “[t]he assimilative capacity multiplied by one-third for all indicator parameters except dissolved oxygen; or [t]he sum of the existing level multiplied by one-third for dissolved oxygen.” Wisconsin Administrative Code NR 207.05(2).
- Colorado: For BCCs, “less than 10 percent of the existing total load to that portion of the segment impacted by the discharge for critical constituents; provided that the cumulative impact of increased loadings from all sources shall not exceed 10 percent of the baseline total load established for the portion of the segment impacted by the discharge”. For non-BCCs, “less than 15 percent of the baseline available increment, provided that the cumulative increase in concentration from all sources shall not exceed 15 percent of the baseline available increment.” Colorado Administrative Regulation 31.8(3)(c).

De Minimis Allowance for Activities

Activities that will only result in insignificant or temporary lowerings of water quality do not warrant the time and expense of dischargers demonstrating and the State reviewing whether an activity should be allowed. Full antidegradation review should only be required for projects that will likely result in a significant lowering of water quality.² Exceptions to antidegradation review allow specific activities to occur without antidegradation review because these categories of activities do not cause a significant lowering of water quality. Including a set of exceptions in antidegradation rules provides certainty and ease of administration because interested parties understand that certain activities will not require full antidegradation review.

The rules should retain the set of exceptions in the antidegradation implementation procedures for the Great Lakes system for high quality waters and OSRWs. *See* 327 IAC 5-2-11.3 and 5-2-11.7. The short-term, temporary provision should also be incorporated into the provisions for ONRWs. EPA has reviewed Indiana's Great Lakes rules, and approved the antidegradation implementation procedures, including the set of exceptions. Additionally, we believe that when proposing an antidegradation rule to cover the entire State, IDEM should include the new exceptions that it proposed in the February 1, 1999 draft triennial review rule:

General Permits:

All activities covered by general permits should be excepted from antidegradation review because these activities do not result in a significant lowering of water quality. IDEM already has authority to require an individual permit for an activity if IDEM determines that a general permit is not adequate to assure compliance with water quality standards. The types of activities covered by general permits are:

- 1) episodic in nature because discharges only occur during wet weather events (e.g., stormwater discharges associated with construction or industrial activity);
- 2) temporary (e.g., hydrostatic testing at commercial pipelines); or
- 3) otherwise do not significantly lower water quality (e.g., non-contact cooling water discharges).

General permits are only authorized for activities with an insignificant water quality impact. Otherwise, IDEM should be requiring dischargers to obtain an individual permit. *See* 327 IAC 15-2-9(b)(1): "(b) ... Cases where individual NPDES permits may be required include the following: (1) The applicable requirements contained in this article

²It should be noted that the Tier 1 antidegradation policy provides absolute protection to all waterbodies by ensuring that water quality is not lowered below applicable State water quality standards.

are not adequate to ensure compliance with: (A) water quality standards under 327 IAC 2-1 or 327 IAC 2-1.5; or (B) the provisions that implement water quality standards contained in 327 IAC 5.” If the concern with excepting certain general permits from antidegradation review regards specific situations where water quality standards may be jeopardized, it is appropriate for IDEM to require individual permits for these situations. Furthermore, requiring antidegradation review for general permits would negate the fundamental efficiencies of the general permit program, by requiring case-by-case review of in excess of 3,000 activities subject to general permits in Indiana. This number will increase by thousands more as the Phase II stormwater regulations are adopted and implemented by IDEM. Lastly, it should be noted that the neighboring States of Michigan and Ohio have already decided that it is appropriate to except general permits from full antidegradation review.

Variances:

Discharges that have been granted variances should be excepted from antidegradation review because the application and review process for obtaining a variance is substantially the same as the antidegradation demonstration and review process. Furthermore, because variances allow temporary exceptions to water quality standards for certain dischargers, subjecting those dischargers to antidegradation review for high quality waters does not make sense.

All variance applications must review both the types of technology capable of treating the pollutant of concern and the social and economic costs of installing and operating each type of technology. This review is very similar to the technology review and demonstration of social or economic importance that is required for antidegradation review. In fact, U.S. EPA recommends that States use the same process for reviewing social and economic impacts for variances and antidegradation review. *See Interim Economic Guidance for Water Quality Standards Workbook*, March 1, 1995, EPA 823/B-95-002. Thus, if IDEM has granted a variance to a discharger, it makes sense that the discharger should not also need to complete an antidegradation demonstration.

More fundamentally, it makes no sense to apply antidegradation review for high quality waters to situations where a discharger is requesting a variance, because a variance grants conditional permission to exceed a water quality criteria or standard. In these cases, the more appropriate review focuses on ensuring that reasonable progress can be made to meet the water quality criterion or standard in the future. This requirement is an integral function of the granting of variances. *See 327 IAC 5-3-4.1(i)(4)*.

Wastewater and Water Treatment Additives:

Discharges of wastewater and water treatment additives (“WTAs”) subject to certain conditions should be excepted from antidegradation review. It is important that IDEM continue to support the exception for WTAs that was adopted by the Water Pollution Control Board in its recent amendments to 327 IAC 5-2-11.7, Great Lakes system dischargers interim antidegradation implementation procedures for outstanding state resource waters. That amended rule provides an exception for WTAs subject to

certain conditions. *See* 327 IAC 5-2-11.7(c)(1)(D). Those conditions allow the immediate use of WTAs, other than bioaccumulative chemicals of concern, that have not been previously approved by IDEM:

- (1) If the WTA is not a biocide, the use of the WTA is necessary to comply with permit conditions.
- (2) If the WTA is a biocide, the use of the WTA is necessary to prevent the loss of human life, personal injury, or severe property damage.
- (3) The permittee shall orally report information of the use of the WTA to IDEM within 24 hours of the time the permittee uses or begins to use the WTA.
- (4) The permittee shall provide written notice to IDEM within 5 days of the time the permittee uses or begins to use the WTA.

See 327 IAC 5-2-11.7(f).

New and Increased POTW Discharges:

Certain new or increased discharges from POTWs should be allowed if they achieve best technology or result in an overall improvement in water quality. These activities should include new or increased discharges of treated sanitary wastewater that are designed to meet the following permit conditions:

- a. Ten (10) milligrams per liter CBOD₅ as a monthly average.
- b. Ten (10) milligrams per liter total suspended solids (TSS) as a monthly average.
- c. One (1) milligram per liter ammonia as nitrogen as a monthly average.
- d. Disinfection by ultraviolet light.

POTWs can be encouraged to design for this high level of treatment technology if they are excepted from further antidegradation review. A proposed new discharge from a sanitary wastewater treatment plant constructed to alleviate a public health concern, for example, a connection of existing residences currently on septic systems. The applicant shall demonstrate that the proposed treatment plant represents the best technology available as described in the previous bullet. This exception represents a clear situation of net improvement to the environment, and likewise should be encouraged.

Remediation Actions:

IDEM should modify the exemption for cleanup actions so that it will not prevent or discourage environmentally beneficial activities. The current exemptions in 327 IAC

5-2-11.3 and 11.7 require that the action be undertaken to alleviate an environmental release that “may pose an imminent and substantial endangerment to public health or welfare.” That “endangerment” test comes from Federal statutes, and has historically been interpreted broadly, so that it is not very difficult to trigger. However, that is not the way that IDEM has interpreted the test in applying its interim antidegradation rules. One case involved a major project for dredging of contaminated sediment from an Indiana river, which is to be done under the authority of CERCLA and RCRA. Also, this waterbody is at the top of IDEM’s §303(d) list of impaired waters, and is one of the top priorities for conducting a TMDL to restore that water to attainment of water quality standards. Nevertheless, IDEM has taken the position that the “endangerment” test was not met, and that the project therefore had to go through antidegradation review. Simply put, that makes no sense. If that project did not meet the “endangerment” test, then we find it hard to conceive of any cleanup activity that would meet the test. In that case, the “response action” exemption from antidegradation review would be meaningless.

To avoid that illogical and environmentally counterproductive result, the “response action” exemption should be modified to remove the requirement that the response action must meet the “endangerment” test. As long as the activity is conducted under CERCLA, RCRA, or similar Federal or State authorities, there is adequate assurance that the cleanup is necessary and will improve the environment. In that case, there is no reason that antidegradation review is needed. In fact, having to go through that review would only discourage parties from taking responsible cleanup actions, which would result in more impact to the environment, rather than less. To encourage those cleanup activities, the exemption should be clarified to ensure that antidegradation review is not required.

Other Exemptions That Should Be Added to the Rules:

- Antidegradation review should not be required for pH, WET and heat/temperature. It is simply not feasible to apply a trigger level for antidegradation review to these parameters. The standards adopted by the Board are the only valid reference point to use in assessing water impacts with respect to these parameters. IDEM already has to enforce those standards through permit limits, so there is nothing to be gained by using those standards in the antidegradation process. In the February 1, 1999 draft rule, IDEM has recognized this fact with respect to pH and WET by specifying that those parameters will not be subject to antidegradation review. The same reasons for making that decision apply also to heat/temperature, so those parameters should be treated the same as are pH and WET. The rules should also clarify that thermal discharges subject to Section 316(a) thermal variances are not subject to antidegradation review, but rather must be consistent with Section 316 of the Clean Water Act.
- An exemption should be provided for research and development projects. These projects are generally short-term and temporary in nature, and produce socially important results. Further, IDEM has provided exemptions for these activities in other portions of its rules.

- Finally, an exemption should be provided for “brownfields” and other redevelopment projects. An important policy of this State is to encourage redevelopment of former industrial sites in urban areas. If a company seeks to build a new facility in one of those areas, bringing new jobs into areas where those jobs are badly needed, State policies should encourage those activities. If a developer has to go through the lengthy and resource-intensive antidegradation review process before beginning a redevelopment project, it might very well go elsewhere, especially since it might find out at the end of the process that its project did not meet the vague “important social and economic development” test, so that the project would not “pass” antidegradation review and could not happen at all. To avoid that result, there needs to be a “brownfields” exemption in the antidegradation rules, so that companies are encouraged to pursue redevelopment of sites in urban areas, including areas that have been designated as “empowerment zones.”

DEMONSTRATION OF TECHNICAL NECESSITY OF LOWERING WATER QUALITY

The antidegradation policy for high quality waters provides that the existing high quality of a water body shall be maintained and protected unless the State finds, after implementation of its intergovernmental coordination and public participation requirements, that lowering the existing water quality is necessary to accommodate important economic or social development in the area in which the waterbody is located. EPA and IDEM have interpreted the provision concerning lowerings that are necessary to accommodate important economic or social development to require two demonstrations: one about technical necessity and the other about economic or social importance. The technical necessity component concerns reviewing whether the proposed discharge will be minimized to the extent that is technical practicable, considering cost-effective, reasonably available control measures. Under this test, a new or increased discharge will be approved during antidegradation review to the extent that the discharge cannot be prevented or reduced by those measures.

The technical necessity component of antidegradation review should focus on whether cost-effective, reasonably available technologies can reduce or eliminate a proposed significant lowering of water quality. Further, if a discharger is meeting federal technology-based standards, it should not have to make another demonstration regarding technical necessity in antidegradation review. Where federal technology-based standards have not been developed, the assessment of technical necessity should focus on national capabilities of a particular industry. This process provides a precise set of protocols that both dischargers and the public could use to monitor the work of IDEM. It provides IDEM a defensible reason to choose an option and a framework to make predictable, consistent decisions.

Cost must be taken into consideration during the technical necessity portion of antidegradation review. It has been suggested by certain members of the environmental community that the technical necessity component of antidegradation review should not take cost into consideration, and should instead be a test of whether any technology,

regardless of its expense or availability, is available as an alternative to lowering the quality of a high quality waterbody. This position is not supported by federal regulation and guidance on antidegradation review, and is not an appropriate policy for the State of Indiana to adopt. The Great Lakes Water Quality Guidance, EPA's most complete explanation of antidegradation review, states that the technical component of an antidegradation demonstration should include the following analyses:

A. Pollution Prevention Alternatives Analysis. Identify any *cost-effective* pollution prevention alternatives and techniques that are available to the entity, that would eliminate or significantly reduce the extent to which the increased loading results in a lowering of water quality.

B. Alternative or Enhanced Treatment Analysis. Identify alternative or enhanced treatment techniques that are available to the entity that would eliminate the lowering of water quality and their *costs* relative to the cost of treatment necessary to achieve applicable effluent limitations.

40 CFR Part 132, Appendix E, III – Antidegradation Demonstration. [Emphasis added.] It is clear from this regulatory language that EPA intends the technical necessity demonstration to take costs into consideration. This regulation is supported by information provided in the Supplementary Information Document (“SID”):³

To assess the need for a significant lowering of water quality, a person proposing an action that would lower water quality would first determine whether or not existing treatment, pollution prevention, additional treatment or some combination *within a defined cost range* could avoid the need to lower water quality.

SID, Section VIII.A.2.c., Antidegradation Demonstration. [Emphasis added.] EPA's regulations and guidance on the technical necessity demonstration clearly take cost into consideration. There is absolutely no reason for Indiana to make its demonstration requirements more stringent. In fact, cost considerations must play a role in the technical necessity demonstration; otherwise, most dischargers would ever get beyond this part of the demonstration, and antidegradation review would act as a complete bar to new or increased discharges.

If a discharger is meeting federal technology-based standards, it should not have to make another demonstration regarding technical necessity in antidegradation review. Technology review could become extremely cumbersome and time-consuming, slowing down the process for making changes in facility operations. Also, if not done properly,

³“Water Quality Guidance for the Great Lakes System: Supplementary Information Document (SID),” EPA-820-B-95-001, March 1995.

the technology review could contradict control decisions that have already been made by U.S. EPA. For many industries, EPA has issued effluent limitations guidelines, which specify technology standards for the industry (e.g., best available technology, best practicable technology, best conventional technology, new source performance standards). Industrial dischargers have spent millions of dollars to install technology controls. These dischargers should not be forced to possibly spend even more to remove those controls and install other equipment based on an antidegradation review. Instead, if a discharger has installed federally-required technology controls, it should be presumed that those controls meet the antidegradation technical necessity test and nothing more should be required. This presumption would make the antidegradation review process significantly quicker and more efficient for all concerned, and would ensure that soundly based technology decisions made by EPA are given full credit.

Where federal technology-based standards have not been developed, the assessment of technical necessity should focus on national capabilities of a particular industry. When EPA has not established technology requirements for a particular industry or operation, IDEM should adhere strictly to the spirit of the EPA process in undertaking a technical necessity review. Federal rules establish how case-by-case effluent limitations are set. These rules consider the age of the equipment and facilities involved, the processes employed, the engineering aspects of the application of various types and control techniques, process changes, the cost of achieving such effluent reduction, and non-water quality environmental impact (including energy requirements). The assessment should compare nationwide capabilities in a particular industry, not only a particular Indiana facility capability. An Indiana facility would be justified in reducing a proposed discharge if, and only if, it would have been required for the entire industry in accordance with EPA protocols. In following such a policy, the economic analysis follows the standard procedure that EPA would use to tighten controls in a manner fair across the same industry.

DEMONSTRATION OF IMPORTANT ECONOMIC OR SOCIAL DEVELOPMENT

According to both federal regulation and State rule, the antidegradation policy for high quality waters provides that the existing high quality of a waterbody shall be maintained and protected unless the State finds, after implementation of its intergovernmental coordination and public participation requirements, that lowering the existing water quality is necessary to accommodate important economic or social development in the area in which the waterbody is located. 40 CFR 131.12(a)(2); 40 CFR Part 132, Appendix E; 327 IAC 2-1-2(2); 327 IAC 2-1.5-4(b). The federal and State rules do not require IDEM to be solely responsible for making determinations about the economic or social importance of activities and projects; rather, they simply require the State to make the determination. Agents of the State other than IDEM, whether other State agencies or local government, already have the authority and duty to make judgments about the economic or social worth of a project or activity. The economic or social importance demonstration process should rely on these State agents to act within their existing authority to review economic or social importance. This approach will

assure that the decision maker is appropriate to carry out the task. It will also avoid the redundancy of having multiple governmental entities making similar or identical decisions, and eliminate the possibility of inconsistent findings.

In a memorandum dated March 14, 2001, IDEM took the position that it alone must make the affirmative determination about what activities are economically or socially important. However, the antidegradation policy requires the State to make a determination about important economic or social development. Neither the federal nor the State rule specify that any one agency, such as IDEM, is solely responsible for the decision. In fact, IDEM has admitted that making decisions about what types of activities are economically or socially important is outside of its functions, proficiencies and area of expertise. Other agents of the State, whether other State agencies or local government, already have the authority and duty to make judgments about the economic or social worth of a project or activity. For example, the Indiana Utility Regulatory Commission (“IURC”) is responsible for ruling on the necessity of public utilities. Similarly, decisions about new development are addressed by local governments through the planning and zoning process. Thus, the demonstration process should rely on these State agents to act within their existing authority to review economic or social importance. This approach will assure that the decision maker is appropriate to carry out the task. It will also avoid the redundancy of having multiple governmental entities making similar or identical decisions, and eliminate the possibility of inconsistent findings. Of course, under this approach, IDEM would still be making the other determination under antidegradation review: that the new or increased discharge is necessary from a technical standpoint.

We recommend that the following process be used to conduct important economic or social development reviews.

New Business and Development

New business and development activities typically require review and approval by one or more agents of the State. If an agent of the State approves a new business or development, this decision is presumed to meet the economic or social importance test for antidegradation purposes, and separate review by IDEM is not necessary. The following are examples of appropriate agents of the State:

- The IURC judges the necessity of public utilities by reviewing current and anticipated future needs for service in the area in which the utility intends to locate and by reviewing the utility’s proposed rate structure. If the IURC determines that a public utility is needed in an area, it issues a certificate of public convenience and necessity. For example, power utilities may only be sited upon a finding that “public convenience and necessity require or will require the construction, purchase, or lease of the facility.” IC 8-1-8.5-5(b)(3). Thus, if the IURC issues a certificate of public convenience and necessity to a power company, its judgment meets the requirement under antidegradation concerning demonstration of important economic or social development. We recommend this approach for all public utilities regulated by the IURC.

- The Indiana Department of Commerce (“IDOC”) issues grants and loans to support new and expanding businesses in Indiana. For example, the Industrial Development Grant Funds awards money to local governments to build infrastructure needed for a new or expanded business. IDOC requires that the project be related to economic development and have the potential to create new jobs. Projects that are eligible for grant funds include water and sewer lines, wastewater treatment facilities, drainage facilities, road improvements, rail spurs and fiber optic cable. Several of the eligible projects – sewer lines, wastewater treatment and drainage facilities, road improvements – could result in a new or increased discharge of wastewater subject to antidegradation review. If IDOC has determined that such infrastructure is necessary to economic development in the area, it should automatically be assumed that the project has demonstrated its economic importance under antidegradation. Likewise, it is possible that the infrastructure project is needed to support a business that will have a new or increased discharge of wastewater. Once again, IDOC’s decision to award grant funds to the infrastructure project should satisfy any antidegradation requirements concerning economic or social importance to the business expansion project.
- Indiana’s home rule statute vests local units of government – including counties, cities, towns and townships – the powers they need to effectively operate local affairs. IC 36-1-3. In particular, IC 36-1-3-3(b) provides that “[a]ny doubt as to the existence of a power of a unit should be resolved in favor of its existence.” In addition, IC 36-1-3-4 in part states:
 - (b) A unit has:
 - (1) All powers granted it by statute; and
 - (2) All other powers necessary or desirable in the conduct of its affairs, even though not granted by statute.

Land use planning and development is a primary duty of local government. IC 36-7-2-2 describes the general power of a local unit of government to “plan for and regulate the use, improvement, and maintenance of real property and the location, condition, and maintenance of structures and other improvements.” Furthermore, IC 36-7-4-201, in defining the purpose of local planning and zoning, provides as follows:

- (b) The purpose of this chapter is to encourage units to improve the health, safety, convenience, and welfare of their citizens and to plan for the future development of their communities to that end:
 - (1) That highway systems be carefully planned;
 - (2) That new communities grow only with adequate public way, utility, health, educational, and recreational facilities;
 - (3) That the needs of agriculture, industry, and business be recognized in future growth;
 - (4) That residential areas provide healthful surroundings for

family life; and

(5) That the growth of the community is commensurate with and promotive of the efficient and economical use of public funds.

Through the planning and zoning process, local governments are charged with the responsibility to make decisions about what activities are important for their areas, whether in terms of economic growth, public health and safety or social improvement.

In this regard, local governments have the authority to act on behalf of the State in the local planning process of determining economic or social importance. Other actions by local entities can have the same meaning. These decisions include providing tax abatements, roads and utilities at tax payer expense, and other initiatives demonstrating the value the local entity finds in having the action take place. Therefore, IDEM does not need to have a redundant oversight approval process for antidegradation review. This should be the case whether the new business or development needs to get an area rezoned, needs a variance from a zoning classification, or otherwise seeks support from the local government. It also is appropriate if the area is already properly zoned, because the local government has previously made the decision that business or development of a certain type is economically or socially important for the community. Furthermore, to the extent a process is considered that requires local government review outside of the traditional planning and zoning process, antidegradation review should not become a second attempt for opponents to fight a project that has already received local approval.

Undoubtedly, there are other existing state agencies and local governments that could have an important role to play in review of economic or social importance. For example, the Indiana Development Finance Authority provides several grants and loans to Indiana businesses. Also, activities requiring antidegradation review that will be located in areas participating in the Indiana Enterprise Zone Program, which is designed to improve the quality of life in designated enterprise zones through community and business redevelopment initiatives, should automatically qualify as important. If the general approach allowing appropriate agents of the State to make economic or social importance determinations is adopted, other existing authorities would need to be identified and evaluated for their appropriateness.

It may be the case that some new businesses or developments will not be required to undergo a preexisting state or local approval process. This could be the case for activities or projects that do not require oversight by a state agency, and which will be located in one of the Indiana counties that have not adopted local planning and zoning control. In these situations, several options should be available. First, new businesses or developments could request that the local government adopt a resolution or issue a letter of support for the activity or project. If the local government does so, this action would create a presumption of the economic or social importance of an activity or project. If the local government does not act, the new business or development would submit

information to IDEM or another agent of the State to allow it to make an economic or social importance decision. Likewise, at its option, the new business or development could go straight to IDEM or another agent of the State to seek a determination that an activity or project is economically or socially important.

Existing Business and Development

There are two scenarios that could arise for existing business and development activities. First, a business or development simply could be increasing its capacity, but not otherwise making new products or adding new processes. For example, a manufacturer that currently produces one million units of its product a year could decide to boost production to two million units a year. In this case, economic or social importance review should not be necessary because it is presumed that the existing business or development is important to the area, and that action of increasing capacity enhances the importance of the business or development. In other words, if the business or development was originally judged to be economically or socially important, doing more of the same does not require additional review.

The second scenario that could arise involves an existing business or development wanting to add a new product or process that changes the nature of the business or development, and consequently, the nature of the discharge from the facility. As a general rule, these types of changes may not require any review by a state agency or a local zoning determination. Therefore, the same set of options be used as those stated above for new business or development without preexisting state or local review. The existing business or development could seek a local resolution or letter of support or request review by IDEM or another agent of the State if local government does not act or in lieu of local government action.

Consideration of Benefits of New or Increased Discharge

In connection with the social and economic development analysis, IDEM should be required to consider the environmental benefits of the affected discharge. For example, cooling water is valuable for low-flow augmentation and, for that reason, may be environmentally preferable to any nondischarge alternative. Arguably, those types of benefits militate against any finding of degradation or, alternatively, support the important economic and social development prong of antidegradation review.

SPECIAL DESIGNATIONS: EXCEPTIONAL USE, OUTSTANDING STATE RESOURCE, AND OUTSTANDING NATIONAL RESOURCE WATERS

If this rulemaking will establish the criteria and procedures for making special designations, it must consider the new special designation requirements of SEA 431, which establish a high bar for designation of waterbodies as ONRWs and OSRWs. These new requirements reflect the General Assembly's intent to make the ONRW and OSRW designation process thorough and to ensure that only those waters truly deserving of special protection receive this designation. As can be seen from the types of

information that the Board must consider before designating an OSRW or recommending an ONRW, factors such as economic development, social growth and existing land uses are key considerations. The draft rule must reflect these factors.

ONRWs:

The ONRW designation is meant to describe the benchmark of water quality that shall be maintained and protected, and is only intended for certain types of important waters:

- Waters protected through federal or state law, presidential or secretarial action, international treaty or interstate compact.
- Waters with exceptional recreational significance.
- Waters with exceptional ecological significance.
- Waters with other special environmental, recreational or ecological attributes.
- Waters for which designation is necessary to protect other ONRWs.

IC 13-18-3-2(d). Only the Indiana General Assembly can designate a waterbody as an ONRW, following recommendations made by the Board and the Environmental Quality Service Council. *See* IC 13-18-3-2(o). Prior to these recommendations, IDEM must hold a public notice and comment period. Public comments and information must be summarized and presented with a recommendation for designation to the Environmental Quality Service Council. The Council, in turn, must consider the comments, information and IDEM's recommendation, and provide a recommendation to the General Assembly. *See* IC 13-18-3-2(p).

OSRWs:

The designation requirements for OSRWs are even more detailed. The Board may not adopt a rule designating a waterbody as an OSRW until it has considered the following factors:

- Economic impact analyses taking into account future population and economic growth, presented by any interested party.
- Biological criteria scores, considering fish communities, macroinvertebrate communities, and chemical quality criteria using representative biological data from the waterbody under consideration.
- The current level of urban and agricultural development in the watershed.
- Whether the designation will have a significant adverse effect on future population, development and economic growth in the watershed, if the waterbody is in a

watershed with more than three percent urban land use or serves a municipality with a population of greater than 5,000.

- Whether the designation is necessary to protect the unique or special ecological, recreational or aesthetic significance of the waterbody.

IC 13-18-3-2(h). The Board must also make a determination that the waterbody has some unique or special ecological, recreational or aesthetic significance. *See* IC 13-18-3-2(g). All of these considerations and findings must be summarized, made available to the public and presented to the Environmental Quality Service Council. *See* IC 13-18-3-2(j). Further, for any newly designated OSRWs, the Board must have already adopted antidegradation implementation procedures consistent with other provisions of SEA 431, which are discussed below. *See* IC 13-18-3-2(n).

Exceptional Use Waters and Other Special Designations Between Tier 2 and 3

The first notice recognizes that SEA 431 requires the Board to consider redesignating exceptional use waters as outstanding state resource waters (“OSRWs”). In fact, SEA 431 instructed the Board to complete this redesignation process no later than October 1, 2002. *See* SEA 431, section 27 (non-code). *See also* HEA 12221 (2003). IDEM should expedite this reevaluation process by adopting antidegradation implementation procedures for OSRWs in this rulemaking process, which is a prerequisite to designating any new OSRWs. *See* SEA 431, section 17, codified at IC 13-18-3-2(n).

SEA 431 only recognizes three categories of “special designation” waters: ONRWs, OSRWs, and exceptional use waters. Despite this clear statutory structure, the first notice states that it may be appropriate to provide an additional antidegradation tier 2.9. It is entirely unclear what this additional tier would accomplish, but such a consideration would clearly be outside of the authority of SEA 431. This rulemaking should not consider addition of a tier 2.9 category of waters.

SEDIMENT AND BIOLOGICAL CRITERIA

The first notice states that an alternative under consideration in this rulemaking is “to what extent sediment and biological integrity may be used as water quality standards.” This rulemaking process should be strictly limited to antidegradation standards and implementation procedures. Sediment and biological criteria should not be considered at all at this time. IDEM has not assessed the current state of the science on sediment quality and its relationship to water quality, nor has it sufficiently developed biological criteria protocols to justify using them as a regulatory mechanism for determining and protecting water quality. In addition, the Board does not have the authority to adopt sediment or biological criteria.

Conclusion

We appreciate your consideration of these comments, and look forward to working with the IDEM, other stakeholders and the Water Pollution Control Board on appropriate revisions to Indiana's rules concerning antidegradation standards and implementation procedures. If you have questions, please give me a call.

Sincerely,

Kari Evans

cc: Members of the Indiana Water Quality Coalition
Patrick Bennett, Indiana Manufacturers Association